No. 9950

in the

United States Circuit Court of Appeals

for the

Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

vs.

GARAVENTA LAND & LIVESTOCK CO., a Corporation, et al, Appellees.

Appeal from the District Court of the United States, for the District of Nevada

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BRIEF FOR APPELLEES

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APPELLEES' STATEMENT OF THE CASE

The United States of America has appealed from the final judgment entered in the above-entitled case by the District Court of the United States, for the District of Nevada. Final judgment was rendered, entered and docketed March 8, 1941 (R. 35). The written opinion was signed and filed on the same date (R. 36-49).

The notice of appeal was filed June 7, 1941 (R. 58-59).

Appellees are of the opinion that the statement of facts recited in appellant's statement appearing on pages 2 to 6 inclusive of its brief are correct insofar as they go, but say that all of the pertinent facts upon

which the District Court rendered findings and judgment are not included in the statement. Only so much as tend to support appellant's theory of the case are included. Appellees refer to and adopt the statement of facts which are succinctly set forth in the court's opinion and decision (R. 36-49) and also in the court's findings in fact (R. 89-103).

There was no motion for a new trial filed, but a motion to reconsider the opinion and decision was filed on April 2, 1941 (R. 51). An order denying the motion for reconsideration was entered in the minutes of the court June 2, 1941 (R. 52).

ARGUMENT

I. APPELLEES ACQUIRED RIGHTS IN THE LANDS IN QUESTION WHEN THEIR ENTRIES AND FIRST INSTALLMENT PAYMENTS WERE ACCEPTED.

The statement of points on appeal filed by appellant are limited to three specific points and a general one, viz., that the judgment dismissing the case was erroneous (R. 107-8).

a. The first point relied upon is that the defendant has acquired no rights under the Act of June 7, 1924.

The complaint herein (R. 2-5) alleges that defendant's (appellee, Garaventa Land & Livestock Co.) application to purchase the particular land was allowed and that Eighteen Hundred and Fifty-three Dollars and Ninety-two Cents ($1853.92) was paid by said defend-

ant. The complaint is founded upon the theory of a contract of purchase and a cancellation for default in the payment of the balance of the installments.

The appellees acquired the right to the possession of the land under the particular Act of June 7, 1924, immediately upon the filing and approval of their applications to purchase. The applications of all of the parties involved in this appeal were accepted and approved and the first installment of one-fourth (¼) of the purchase price was paid to the United States. (In the case of M. P. Depaoli the full amount was eventually paid and deposited in the U. S. Treasury.) (R. 238.)

The entry and occupation of the land under the Act of June 7, 1924, after the approval of the settler's applications and payment and acceptance of money established rights to the land in the settlers (appellees) which are questioned by Point No. 1 on the appeal.

In the case of *Orchard vs. Alexander,* 157 U. S. 372, 383-39 L. Ed. 737, 741, the Supreme Court said:

> "The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed."

See also *Carrol vs. Stafford,* 11 L. Ed. 671, 3 How. 441; *Witherspoon vs. Duncan,* 4 Wall 210, 18 L. Ed. 339.

The Act of June 7, 1924, under which appellant asserts the appellees have no rights, shows clearly that Congress recognized the equities of the appellees in

adopting the law, and that it is a special act for the relief of these settlers. The title of the Act reads:

> "An Act for the relief of settlers and town-site occupants of certain lands in the Pyramid Lake Reservation, Nevada."

The act is quite different from the Pre-emption, Homestead, Desert Land Act, Mineral Land laws, etc., in that it contemplates a sale on terms to the settlers to whom it was intended to grant relief. The act specified that the lands could be sold only to settlers or their transferees • • • who had settled upon, occupied and improved the lands in good faith for a period of twenty-one years or more immediately prior to the passage of the Act (R. 135-6, and see Appendix "B" attached hereto).

The only Rules and Regulations under which the entries were made were issued in a letter dated March 3, 1925, addressed to the Register and Receiver, Carson City, Nevada, by the Commissioner of the General Land Office and approved by E. C. Finney, First Assistant Secretary Interior (R. 135).

The rules and regulations provide, inter alia:

> "You will transmit the application and affidavit to this office and will hold the money in your unearned account until action is taken on the application." (R. 155).

The complaint admits the fact that applications were approved and that the money paid at the time of the filing of the applications was accepted by the government and deposited in the U. S. Treasury.

From the date of such acceptance of the applications

and purchase moneys the settlers held rights in the lands covered by their entries. The lands were no longer Indian Reservation lands, nor could they be otherwise disposed of or affected by other legislative grants or unauthorized rules.

> *Hastings & Dakota Railroad Co. vs. Whitney,* 132 U. S. 357-363, 10 Sup. Ct. 112, 115, 33 L. Ed. 363;
>
> *State vs. Mendez,* 61 Pac. (2d) 300;
>
> *U. S. vs. Chicago M. & St. Paul Ry. Co.* (C. C.), 148 Fed. 884-890;
>
> *Whitney vs. Taylor,* 158 U. S. 85, 92, 95, 15 Sup. Ct. 796; 39 L. Ed. 906;
>
> *Morrow vs. Warner Valley Stock Co.,* 101 Pac. 171-189.

The lands involved in the instant suits were clearly segregated from the Pyramid Lake Indian Reservation by Congress under the Act of June 7, 1924 (43 Stat. 596, C. 311), and the lands became subject to outright sale to qualified entrymen or purchasers. The qualifications of applicants for the land were set forth in the Act itself, viz.:

> "That the lands applied for have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act."

The complaint in the instant proceeding clearly shows that the applications and entries authorized by the Act of June 7, 1924, were accepted and approved by the Secretary of the Interior. The moneys paid thereon were deposited with the Treasury of the United

States. It will be noted that the settlers protested the appraisal price fixed by the United States but, in order to save the rights they claimed in the lands by virtue of their settlement upon the lands while unsurveyed in the early sixties, paid the money under protest so as to be further heard regarding the appraisal price of the lands. It was at that time contended that the improvements made by the settlers on the lands in the way of dams, ditches, clearing, levelling, cultivation, construction of fences, buildings, homes and other farming improvements, had not been taken into consideration by the appraisers appointed by the Secretary of the Interior to appraise the land (R. 189-190-191). It will be noted that in the original application, applicant Garaventa Land & Livestock Company stated (R. 190):

> "The prices to be paid for the said land are governed by the notice of March 3, 1925, and local land office, dated May 1, 1925, under the same heading, or in the event any changes are made in the ruling of March 3, 1925, reducing the prices to be paid for the said land or the terms of payment the undersigned desires and requests the benefit thereof."

On page 191 of the record, it appears as follows:

> "United States Land Office at Carson City, Nevada.
>
> "I Hereby Certify that the aforesaid lands as applied for above are subject to entry by the above named applicant at the price specified in notice of March 3, 1925, No. 1, 169, 548 'K' MMJ.
>
> CLARA M. CRISLOR, *Register.*
>
> "Above described land not classified properly applicants reserve the right to file supplementing maps and classification.

"Price of land protected *(Should read "protested")* and fee paid under protest.

"Garaventa Land & Livestock Co.
"By Frank N. Garaventa."

The record will show that continuously thereafter until the filing of the instant suit the entrymen were seeking relief by way of a reduction of the appraisal price of the land through the Secretary of the Interior and through Congress. It was contended by the settlers that the appraisal price of the land was exorbitant and that the intention of Congress was to fix a price upon the land in its natural state rather than upon the value of the land as improved by the settlers. The recognized value, in fact the value fixed by Congress upon homestead lands similar to the lands entered by the settlers here involved, is $1.25 per acre in their natural state. The settlers contended that the Secretary of Interior did not take into consideration or give effect to the equities of the settlers because the appraised values of the lands included the value of the improvements made by the settlers; thus in effect compelling the settlers to pay twice for the improvements, first, the initial cost of making the improvements, and, second, the value of the improvements after they were made. During the period when the settlers were attempting to have the appraised value of the land reconsidered, and after their applications had been approved and the first payment made on the purchase price, Congress passed an act on December 22, 1928 (45 Stat. 1069, C. 47, P. 1; 43 U. S. C. A. Sections 1068 and 1068A). See Appendix "A" attached hereto.

The said Act, among other things, authorizes the Secretary of the Interior to sell tracts of public lands not exceeding 160 acres that have been held in good faith and in peaceful, adverse possession by a citizen of the United States, his ancestors or grantors, for more than twenty years under claim or color of title, and where valuable improvements have been placed on such land, or some part thereof has been reduced to cultivation, at a price of not less than $1.25 per acre.

Section 2 of the Act provides for an appraisal of such lands by the Secretary of Interior but it will be noted that

> *"said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement of the lands by the applicant or his predecessors in interest, and in such appraisal the secretary shall consider and give full effect to the equities of any such applicant." (Italics ours.)*

By the foregoing Act, Congress clearly recognized the equities of settlers who had in good faith entered upon lands of the United States and cultivated and improved the same.

The efforts of the appellees to have recognition given to the value of their improvements in making the appraisal upon their said lands was continued up to the date of the filing of this suit. It is contended by them that the Secretary of the Interior did not give full recognition to the Congressional intent, either in the Act of June 7, 1924, or 43 U. S. C. A. 1068-1068A.

Congress could not have spoken more clearly as to the equities of the settlers who are situated similarly to those here situated than it did by enacting Title 43 U. S. C.A., Sections 1068 and 1068A. It will be noted in the opinion and decision and the findings of fact of the District Court that the equities referred to in 43 U. S. C. A., Sections 1068 and 1068A, were given consideration by the District Court (R. 36-49 inc. and R. 89-103 inc.). Even the Commissioner of Indian Affairs concedes the equities of the defendant settlers. See the quotation contained in court's decision R. 45-56, wherein it is said:

> "The white settlers have only such legal rights as were extended to them by the Act of June 7, 1924, but their equities are unquestioned and in view of all of the facts and circumstances of this case, not one of them may be charged with bad faith."

The settlers still contend that their equities and rights by virtue of their settlements upon these lands and the improvements placed thereon should be considered by the courts before approving a forfeiture.

Neither the Commissioner of Indian Affairs, William Collier, nor Miss Alida Bowler, the Superintendent of the Pyramid Lake Indian Reservation, had legal authority over the lands in question to make demand upon the settlers to vacate (R. 225-230). From the foregoing authorities, it is apparent that the Act of June 7, 1924, served to effectively withdraw said lands in question from the confines of the Pyramid Lake Indian Reservation. It will be noted that Congress

took it upon itself to segregate these lands as it had the unquestioned authority to do and order the proceeds from the sale of these lands to be deposited in the Treasury of the United States.

It will be noted that the Act of June 7, 1924, provides only that the proceeds of the sales of said lands shall be subject to appropriations by Congress for the Piute Indians and that only when the entry is not made within the time specified in the Act is the United States authorized to enter upon the premises and take possession thereof for the use and benefit of the Indians. Section 4 of the Act states specifically:

> "*Provided that where entry is not made within the time specified,* the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation." *(Italics ours.)*

The entries here involved were all made within the time specified in the Act and were accepted by the Secretary of Interior and the initial moneys paid under protest as above stated. It is the contention of appellees that so long as the applications and entries of the settlers have been accepted and possession was continued on the lands up to the institution of this action in ejectment, that the Bureau of Indian Affairs was without authority to make demand for the possession of the lands. The lands continued to remain segregated from the Indian Reservation by the express terms of the Act of June 7, 1924.

b. The second point relied upon by the appellant is as follows:

> "The Secretary of the Interior had authority to cancel the application of the defendant for its failure to complete the payments on the purchase price."

The power of the Secretary of the Interior is limited by the terms of the Act of June 7, 1924. In the act itself, there is no express provision for the cancellation of the entries. The only authority given by Congress to have the lands restored to the possession of the United States for the use and benefit of the Indians is contained in Section 4 of the Act, which provision is quoted above. It is significant from the Act itself that Congress recognized a right of possession in the entrymen prior to the filing of their applications to purchase the lands under the terms of the act, otherwise the provision last above quoted from Section 4 of the Act would not require a re-entry and resuming of possession of the lands by the United States, except upon the hypothesis that the white settlers were already in possession prior to the entries under some equitable rights. Indeed, the Act prescribed as one of the qualifications for the purchase that the applicants must have settled upon the land in good faith and have continuously occupied and improved it for a period of twenty-one years prior to the passage of the Act. It may have been the intent of Congress in the passage of the Act of June 7, 1924, that the sales should be for spot cash and not in deferred payments. If it be held that the Act did not contemplate

a sale by partial payments, the Secretary of the Interior may have erred in his construction of the Act by authorizing the sales by partial cash payments instead of for spot cash. The only regulations authorized by the Secretary of the Interior with respect to the Act of June 7, 1924, were contained in a private letter dated March 3, 1925, addressed to the Register and Receiver, Carson City, Nevada, signed by William Spry, Commissioner, and approved on March 3, 1925, by E. C. Finney, First Assistant Secretary, which appears in the record, pages 135 to 156 inclusive. The full and complete rules and regulations of the Secretary of the Interior respecting the sales of said lands are contained in said letter. The only modification of the rules and regulations last above referred to appears to have been covered in a telegram approved by the Secretary of the Interior on May 1, 1925, to the Register and Receiver of the Land Office at Carson City to allow the payment of ¼ down and the balance in three equal annual installments on the deferred payments at the rate of 5%. This modification of the rules and regulations appears at pages 167-168 of the Record in a letter addressed to the Secretary of the Interior by the Commissioner of the General Land Office, which contains among other things the following:

> "Regulations under the above Act were prepared in this office and approved by the First Assistant Secretary on March 3, 1925. The regulations allowed each claimant ninety days from the date of the approval of the classification and appraisement of the land within which to pay the appraised price in the District Land Office. The regulations were

> modified by telegram approved by the Secretary on May 1, 1925, to allow the payment of ¼ down and the balance in three equal annual installments with interest on the deferred payments at the rate of 5%."

It is significant that in the foregoing rules, regulations and instructions, the letter approved by the Assistant Secretary of Interior states (R. 155-6):

> "You will advise the settlers on the lands listed of their *rights* under said Act of June 7, 1924, and that if entry is not made within the time specified, the United States Government will take possession of the land for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation and all claims which they may have had thereto by reason of settlement, occupancy and improvements thereon will be forfeited." *(Italics ours.)*

It is evident that the Secretary of the Interior regarded the lands as segregated from the Indian Reservation immediately upon the approval of the application and entry within the ninety-day period specified in the Act and in his regulations thereunder, to which we have last referred. Neither the Act nor the regulations and instructions of the Secretary contemplated any cancellation of the contract to purchase. Inasmuch as the Act of Congress made no provision for cancellation of these entries and apparently did not contemplate any such cancellation, no power vested in the Secretary of the Interior to cancel the entries after the approval of the applications and the segregation of the lands from the Indian Reservation and from all other forms of entry. He had no power to forfeit the equities of the settlers including the moneys paid on the purchase price, except through a resort to a court

of equity as shown by the authorities hereinafter set forth.

c. The third point relied upon by appellant in its statement of points on appeal is as follows:

> "The defendant has no right to possession of the land in suit."

From what appears in the foregoing portions of this brief, it will be seen that by the Act of June 7, 1924, Congress recognized the right of possession and equities of the settlers in the lands in suit. As we have heretofore stated, the Act limits the qualifications of the applicants to purchase the lands to settlers who have in good faith settled upon the land and who have occupied the same for a continuous period of twenty-one years prior to the adoption of the Act and have made improvements thereon. We have also pointed out hereinabove that not only by the Act of Congress of June 7, 1924, but also by the only rules and regulations adopted by the Secretary of the Interior with reference to said purchases that the right to the possession of the land by the settlers was recognized because of their settlements at a time when the lands were unsurveyed and the same were vacant and unoccupied and that such occupancy in good faith continued for a period of sixty-three years prior to June 7, 1924. The approval of the applications of the appellees in the form in which the same exists constituted a contract between the government and the applicants (appellees herein) under which equities arose which could not be arbitrarily defeated by the Secretary of

the Interior but only through the process of a suit in equity whereby the appellees could have a judicial determination of their equities as in any private contract. As will hereinafter be shown, when the United States enters into a contract with an individual, the United States then must resort to the same methods of enforcement as contracts between individuals are enforced.

The appellees lawfully settled upon these lands while the same were unsurveyed and unoccupied (District Court Findings, R. 89-93) and by virtue of the approval of their applications to purchase the land under the Act of June 7, 1924, they continued in lawful possession and occupancy of the respective tracts of land in suit. Having thus been lawfully in possession and occupancy of the lands under a contract of purchase, aside from the equitable rights recognized by Congress in the Act of June 7, 1924, and in the Act set out in 43 U. S. C. A., Sections 1068 and 1068A, it cannot be said that there is any merit to the point that the appellees have no right to the possession of the land in suit.

SECRETARY'S POWER IS LIMITED BY TERMS OF THE ACT OF JUNE 7, 1924

The 1924 act is a specific act controlling the powers of the Secretary of the Interior with reference to the particular lands involved herein. Wherein it varies from the general law it must be held to control. We have elsewhere pointed out that by necessary construc-

tion the Secretary has the power to provide for a sale by cash entry; that he is authorized to sell on terms and conditions; and that the initial part payment constitutes the entry and the sale. As we have shown, the only power in the Secretary under the 1924 act to enter and take possession is in the event that the "entry" is not made in ninety days. Here the entry was made within that time. The sale was consummated and the entryman became vested with the rights of the purchaser. The appellant, without pointing to any specific statutory authority so stating, claims that the Secretary has ample power to enter on the lands and take possession after the entry has been made in the event there is a default. The terms of the 1924 act give this power only when the entry is not made. Power is given to the Commissioner of the General Land Office under the direction of the Secretary of the Interior to carry into execution the provisions of the law on public lands (43 U. S. C. A. 1201). This is a general power and is limited by the terms of specific statutes.

Section 1201, cited by appellant, page 7, does not purport by its terms to do more than provide that the Commissioner under the Secretary's direction, shall carry the law into effect. So also, 5 U. S. C. A. 485, cited by appellant, page 7, merely states that the Secretary of the Interior is charged with the supervision of the public business relating to, among other things, public lands. Neither of these sections purports to do more than give authority to the proper agency

to carry the laws into effect. The general section on sales of public lands (43 U. S. C.A. 677) provides that credit shall not be given on such sales. We know that under the 1924 Act credit may be given for the balance of the price. Even if it should be argued that under the law the Secretary had no authority to sell the land on credit, this would be of no aid to appellant. A cash entry was actually made in the instant case and a sale effected. The Secretary would certainly have no authority to cancel the entry for non-payment of the balance of the purchase price if he had no authority to make any provision for unpaid balances in the first place. It seems clear that there cannot from the general statutes be implied a power in the Secretary to cancel for a late payment of a portion due on the balance of the purchase price. There is no provision for credit or payment of balances under the general public land law. Under such law and for such sales the Secretary is without power to arrange for such payments. There never could be an instance under the general statutes where an entryman would owe a balance on land on which he had entered.

43 U. S. C.A. 677, above referred to, prohibiting credit sales, has been the law since the Act of April 24, 1820 (3 Stats. 566), or since 1821. Prior to 1820 credit sales were permitted of public lands under the then existing statutes. It is to be noted that each of these statutes (repealed by the 1820 Act) contained an express provision that unless the unpaid credit balance was paid within the time specified, the land

sold could be forfeited to the United States (e.g., Act May 18, 1796, 1 Stat. 464, Section 7; Act May 10, 1800, 2 Stat. 73, Section 6). The 1924 act contains no such express forfeiture provision, nor can any be implied for the reasons stated. See *Lessee of Joseph Creps v. David Wilkinson,* 9 Ohio 200.

The fact is that Congress failed to make appropriate provisions for forfeiture by the Secretary of the Interior of the title to the land upon which entry was made. The provision for entry and possession by the Secretary if no entry is made is not applicable and there is no other provision in the 1924 Act. The general laws are not the source of the Secretary's claimed power. There is no express provision therefor and none can be implied, the Secretary having no power under the general laws as to credit sales.

Upon the making of the sale in the instant case an equitable conversion was effected. The interest of the appellant thereafter in the lands was that of an interest in personalty. The proceeds of the sale, according to the 1924 Act, are to be deposited in the Treasury and are subject to appropriations by Congress for the Piute Indians. Although deemed by the district court herein as unnecessary for the decision, it should be noted that as stated in the decision itself, the equities of appellees are unquestioned.

As pointed out in the district court's decision (R. 48) default or defaults in deferred payments "would not require such drastic remedy to fully protect the interests of the United States in the sale agreement."

The appellant has attempted to read into the law a non-existent provision for forfeiture above and beyond such rights as it may have or have had by reason of the delay in payments. If the appellant seeks a forfeiture it cannot claim it by virtue of the statutes or by the terms of the agreement. It must come into a court of equity which has always had jurisdiction of forfeitures. There has been no such suit instituted. It is to be noted that although part payment has been made and received there has been no tender or offer by appellant to return this sum.

We have already referred to appellant's contention that the general law gives the Secretary authority to do the acts attempted herein.

Together with the sections above referred to, appellant cites (p. 7) *Standard Oil Co. of California vs. United States,* 107 F. (2d) 402. The case is of interest in that it discusses the powers of the Secretary, particularly under the sections cited. The case itself is of little relevance here. It holds that where the United States grants public lands to a state, reserving those known to be mineral, the decision of the Secretary that certain lands were known to be mineral is a proper exercise of his authority to administer the grant. As the court points out, the problem in the case was "not what authority Congress may confer upon the Secretary, but what authority it has conferred in relation to the administration of this grant." The court reviews the law and points out that the administration requires the decision between adverse claimants and the state

and must determine facts upon which the rights of the state depend as to certain sections of land. The court concludes:

> "To the Secretary is delegated in all such matters the authority of deciding as a fact whether a particular section or any part of it falls within the grant or within an exception."

The situation might be analogous to the instant case if the question involved were whether as a fact the appellees had not been settlers on the land for twenty-one years. The question in the cited case was whether the specific land was subject to the grant.

In the instant case the problem is not analogous. The Secretary's authority to administer the public land laws is not questioned; nor is his authority to administer the law under the Act of 1924; nor do we question the authority specifically given him to sell the particular land in question. What we do say is that it is not part of his authority to cancel the sale and entry under the general grant of authority to him nor under the 1924 act after a valid sale was made and entry and possession taken under the contract by the entrymen.

Together with the Standard Oil case, appellant cites *Michigan Land & Lumber Co. v. Rust,* 168 U. S. 589, 42 L. Ed. 591. The case merely held that the Land Department had power to determine whether certain lands were in fact swamp lands. The title in the state was inchoate until this was finally done. The swamp lands had been granted to the state. The opinion points

to and relies on the specific statutory authority given to the Secretary of the Interior to make the plats of the land and the statute which set forth a standard of classification to be followed. The court also relies on certain actions of the state. The court comments that where the granting act specifically provides for the issue of the patent, the legal title remains in the government prior to its issue. The court continues (168 U. S. 593):

> "It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title."

The case of *Hawley v. Diller,* 178 U. S. 476, 44 L. Ed. 1157, cited by appellant (page 7), was a suit in equity to quiet title and remove a cloud on the basis that the entry in question on the public lands was made by fraud. The act provided only for entry by one in good faith for his own benefit and not for speculation, and set forth that effect to the provisions of the act should be given by regulations of the Commissioner of the General Land Office. On proof of the fraud the Land Department declared the entry void. This it had power to do under the express provisions that an entry might be made and patent issued only where it was in good faith, etc. As the court states, the department had authority

> "to inquire whether the original entry was in conformity with the act of Congress. • • • Of course, that department could not arbitrarily destroy the equitable title acquired by the entryman, and held by him or his assignee."

The court also states that redress can always be had in the courts when the officers of the Land Department have held from a pre-emptioner his rights, when they have misconstrued the law, or when any fraud or deception was practiced which affected their decision.

> See *Hawley vs. Diller,* 178 U. S. 476, 490-493; 44 L. Ed. 1157, 1162, 1163;
>
> *Sanford vs. Sanford,* 139 U. S. 642-647; 35 L. Ed. 290, 291, 11 Sup. Ct. Rep. 666.

In the instant case the entry was made pursuant to and in conformity to the Act of 1924. There is no prerequisite to its validity lacking as was the situation in the Hawley case. For example, we are not concerned with what the Secretary's power to cancel would have been if appellees had failed to come within the class to which the benefits of the act were extended if, say, they were not in fact settlers who had settled on the land for twenty-one years prior to the act, or if they had practiced fraud in their sales agreement. It was that sort of thing which was involved in the cases cited by appellant and which is completely non-existent in the instant case.

At page 7 of its brief appellant cites *Cosmos Exploration Co. v. Gray Eagle Oil Co.,* 190 U. S. 301. That case sustained a demurrer to and dismissed a bill to enjoin interference with the possession of public land selected by the claimant in lieu of land relinquished in a forest reservation. The suit was brought at a time when there was pending before the Land Department a controversy between claimants. The court points

out that the claimant's right to the land had never been determined or accepted as a fact by the proper officials of the Land Department. The local officers had no authority under the law to determine if the selector were qualified and if the terms of the statute had been complied with. A contest as to that fact was presented to the land Department. The court held that under such circumstances the court was not justified in settling the question of whether the claimant had ever made a proper selection. The lack of relevance of this case is apparent. The court merely held that it would not determine the claimant's title as against a protestant when the determination of the claimant's initial right remained pending and undetermined before the Land Department. The claimant's assertion of an equitable title was shown to be at that stage no more than that claimant had done certain things and that the local office had certified that the land in question was open to settlement as far as the local books showed. There had not been the action by the proper officials such as would give an undisputed basis to his claim.

CONGRESS DID NOT AUTHORIZE THE CANCELLATION OF DEFENDANT'S ENTRY OR CONTRACTS OF PURCHASE AS IN THE CASE OF HOMESTEADS, DESERT LAND ENTRIES AND SIMILAR PUBLIC LAND ACTS

The Homestead Act (Section 2297, U. S. Revised Statutes) expressly provides for the cancellation of homestead entries. The section reads:

> "If, at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land-office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government; Provided, That where there may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe."

Congress likewise provided for a cancellation and forfeiture of lands entered under the Desert Land Act. Section 5 of the act of March 3, 1891, 26 Stats. 1096, provides among other things:

> "If any party who has made such application shall fail during any year to file the testimony aforesaid (the proof of improvements, cultivation, map, etc.), the lands shall revert to the United States and the 25c advance payment shall be forfeited to the United States and the entry shall be cancelled."

Without extending the illustration beyond the two foregoing instances, it is clearly shown that the Sec-

retary of the Interior was not authorized by Congress to cancel these contracts of sale. The remedy appears to be the enforcement of the payment of the purchase price. If Congress intended that the contracts of sale should be cancelled after they had been entered into, certainly they would have provided, as they did in the Homestead and Desert Land Acts, for authority to cancel and a reversion of the land to the United States.

The defendants (appellees) cannot be ejected because ejectment depends upon the right of possession when the action is commenced, and the plaintiff did not have such immediate right.

Hutchison vs. Coonley, 70 N. E. 686;
Schoolfield vs. Rhodes, 82 Fed. 153; 27 C. C. A. 95;
Smith vs. McCann, 16 Law Ed. 714;
Coles vs. Meskimen, 85 Pac. 67;
Goldsmith vs. Smith, 21 Fed. 611.

The Secretary of the Interior and similar officers cannot arbitrarily adopt rules in excess of the express authority given by an act of Congress. The rules and regulations adopted must be authorized by the act of Congress under which the same are promulgated and any rule or regulation purporting to assume or take power in excess of the statute is void.

Morrill vs. Jones, 106 U. S. 466;
Campbell vs. U. S., 107 U. S. 407; 27 Law Ed. 592;
Williamson vs. U. S., 207 U. S. 425; 52 Law Ed. 278;
Meads vs. U. S., 81 Fed. 684.

It was thus held that the requirements of Section 1640, Title 43, U. S. C. A., as to proof by homestead entrymen of cultivation and residence by two credible witnesses could not be enlarged by rules and regulations.

U. S. vs. George, 228 U. S. 14, 57 Law Ed. 712.

In the last cited case, the court said in construing what is now Section 22 of Title 5, U. S. C. A. and Sections 2 and 1201 of Title 43 U. S. C. A., that the statutes confer administrative power only and legislative power cannot be exercised under the guise of regulation.

The property of the United States cannot be disposed of except in the manner provided by law and no public officer or department without express authority from Congress has the right to dispose of government property.

Lear vs. U. S., 50 Fed. 65;
Flores vs. U. S., 18 Court of Claims 352.

CONTRACTS BETWEEN THE UNITED STATES AND ITS CITIZENS ARE GOVERNED BY THE SAME GENERAL RULES AS APPLY IN CASE OF CONTRACTS BETWEEN THE INDIVIDUALS

It is the rule that when the United States comes into court, it does so under the same general rules as any other suitor.

Folk vs. U. S., 233 Fed. 177-191 (C. C. A. 8, 1916);
State vs. Towessnute, 154 Pac. 805;
U. S. vs. Arredondo, 31 U. S. 691, 8 Law Ed. 547;
Brent vs. Bank of Washington, 10 Peters 596; 9 Law Ed. 547;
Reading Steel Casing Co. vs. U. S., 268 U. S. 186; 68 Law. Ed. 907;
Cory Bros. Inc. vs. U. S., 51 Fed. (2) 1010;
U. S. vs. American Sales Corp., 27 Fed. (2) 389; 74 Law Ed. 625;
U. S. vs. Oklahoma Gas & Electric Company, 291 Fed. 575;
U. S. vs. Bostwick, 94 U. S. 53; 24 Law Ed. 65.

By the terms of the act of June 7, 1924, the Secretary was given the power to sell the lands in suit to a particular class of settlers and that power is not questioned. The Secretary did enter into a contract for the sale of said lands on credit payments and the transaction is so construed in the plaintiff's complaint. The United States having entered into a contract under the express authority of Congress is required to follow the requirements of the Congressional Act. Once the Government has entered into a contract, it is bound thereby.

Missouri Pacific Railroad Company vs. U. S., 63 Court of Claims 341;
Bush vs. U. S., 52 Court of Claims 199;
Sutton vs. U. S., 256 U. S. 575; 65 Law Ed. 1099.

THE CONDUCT OF THE DEPARTMENT OF THE INTERIOR WITH REFERENCE TO THESE LANDS AND ITS VARIOUS REPORTS TO THE SECRETARY OF THE INTERIOR AND TO THE CONGRESSIONAL COMMITTEES JUSTIFIED THE SETTLERS IN BELIEVING THAT CONGRESS WOULD GRANT THEM RELIEF

It is a familiar rule of contracts that where one party has been led to believe by the conduct of the other that a delay in the performance will not subject the contract to cancellation, he is justified in relying thereon. There is in the record in this case, a transcript of the hearings before the Committee on Indian Affairs of the United States Senate, 75th Congress, First Session, Senate Bill 840. It will be found that in the letter already referred to in this brief dated December 19, 1921, page 15 of the pamphlet, the appraisement values of the land made by three persons selected by the Secretary of the Interior, were deemed excessive and that a recommendation was made by new appraisers that the land values be reduced so as to give the settlers some of the benefits of their work and labor in improving the land and in the construction of improvements.

It is also recognized that the white settlers were actually on the land long prior to March 23, 1874, the date of the Executive Order creating the Indian Reservation and in good faith, believing that they had a right to occupy the lands because the adjacent lands had been selected by the state and by the railroad

company and patents were theretofore or thereafter issued, even though such land was situated within the exterior boundaries of the reservation, delineated by map but not marked on the ground. It will also be noted that while the settlers were attempting to obtain more favorable terms from Congress that no action was taken upon contracts made pursuant to the Act of June 7, 1924. Then came the Act of December 28, 1928—43 U. S. C. A. 1068 and 1068A. This, naturally, led the settlers to believe that they would ultimately receive favorable consideration while the matter was pending. It is recognized by everyone familiar with the situation that the equities of these white settlers are real.

There is no question that forfeitures are not favored and that they may be waived expressly or impliedly:

> "If a contract includes provisions which, if not complied with, involves a forfeiture, and the party for whose benefit the provision is inserted, knowing the other party is not complying with them, makes no objection and acquiesces therein, he waives the forfeiture."
>
> *Hearsh vs. German Fire Ins. Co.,* 110 S. W. 23 (Mo.).

The courts are extremely reluctant to declare forfeiture and, as stated in *New York Life Ins. Co. vs. Eggleston,* 24 Law Ed. 841:

> "Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture."

Mr. Justice Brewer stated in the case of *Tarpey vs.*

Madsen, 178 U. S. 215-220, 20 Sup. Ct. 849-850, 44 L. E. 1042, in referring to the rights of the settler:

> "And in this respect we must notice the oft-repeated declaration of this court that 'the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon.'
>
> *Ard vs. Brandon,* 156 U. S. 537, 543, 15 Sup. Ct. 406, 39 L. Ed. 524;
>
> *Northern Pac. Railroad vs. Amacker,* 175 U. S. 564, 567, 20 Sup. Ct. 236, 44 L. Ed. 274.
>
> "With this declaration, in all its fullness, we heartily concur, and have no desire to limit it in any respect; and if Olney, the original entryman, was pressing his claims, every intendment should be in his favor, in order to perfect the title which he was seeking to acquire."

ALTHOUGH THE UNITED STATES SEEKS TO CANCEL AND FORFEIT THE APPELLEES' INTERESTS IN THE LAND AND IMPROVEMENTS, IT HAS NOT RETURNED OR OFFERED TO RETURN TO THE SETTLERS THE MONEY ALREADY PAID BY THEM OR EXPENDED FOR IMPROVEMENTS

On May 8, 1925, when the appellees filed their applications for the purchase of the lands in suit, each of them paid in cash one-fourth of the appraisal price conformable with the regulations and telegram approved by the Secretary of Interior May 1, 1925, to the Register at Carson City.

If the United States prevails in this action it means the appellees will suffer a forfeiture of the money paid as well as a forfeiture of the value of the improvements on the land.

Where no fraud is charged or claimed by the United States, the money paid must be tendered and returned if a forfeiture is sought.

U. S. vs. White, 17 Fed. 561;
U. S. vs. Budd, 43 Fed. 630;
U. S. vs. Budd, 144 U. S. 154, 36 L. Ed. 384;
People vs. Bryan, 14 Pac. 893 (Cal.);
People vs. Morris, 19 Pac. 378 (Cal.).

In *People vs. Bryan,* supra, the court distinguishes the case of *U. S. vs. Minor,* 114 U. S. 238, by stating that in the Minor case the patent was cancelled for actual fraud.

We are aware of other cases holding that where the property was obtained by fraud the equity rule requiring the tender and return of the money paid does not apply. However, in the instant case the applications and sales were all lawfully made; and plaintiff does not contend otherwise.

In *U. S. vs. Budd,* 43 Fed. 630 (supra) the court said:

> "In considering the merits of the first of the several grounds for canceling the patent, it is important to keep in mind that this is not like a proceeding to rescind a contract. *The government has not offered to return the money it received for the land; and, while it seeks to be restored to its original title and possession, it does not pray to have the parties on both sides placed in the position which they occupied before its officers and agents granted Budd's application to enter the land under this statute, and accepted the money. The case is prosecuted to secure an absolute forfeiture of all the defendants' interests in the land, as well as the money paid for it, and proceeded under the theory that whatever is illegal and wrong in the transaction is chargeable solely to the defendants.* Now, if all that is claimed by the government as constituting the first ground for canceling the patent, both as matter of fact and of law, were conceded, the court would be unable to find any such fraud intended, or misconduct on the part of the defendants, as would afford either legal or equitable cause for the confiscation of their property. At most it is only claimed that this particular land, by reason of having been once offered at public sale, is excluded from sale under the Act of June 3, 1878. If this is so, the sale of it to Budd under that statute was an error, but only an error, and one for which the officers and agents of the government are chiefly responsible; for upon them is cast the duty of administering the law according to its provisions, and of holding all persons seeking to obtain title to lands from the government

to a compliance with the laws and regulations prescribed for the determination of their rights. When the government of the United States seeks relief from a court of equity, it is as much bounden as any individual suitor by the rules of equity; it can obtain such relief only when entitled to it upon principles of equity and good conscience. *U. S. vs. White,* 17 Fed. Rep. 273, 8 Sup. Ct. Rep. 850. *It cannot, to correct a mere error in a transaction not tainted with crime and fraud, perpetrate so grave a wrong on its part as to deprive its adversary of valuable property or a sum of money without any compensation or equivalent therefor.* If this were a suit between two private individuals the plaintiff would not be equitably entitled to a rescission of his contract and restoration of his title to the land without first on his part repaying the purchase money which he had received; *and by the same rules of equity and justice the right to the government to recover this land, and also to hold the purchase money paid for it, must be denied, unless a forfeiture of the defendant's rights on the ground of fraud or willful misconduct can be shown." (Italics ours.)*

LANDS OF APPELLEE, M. P. DEPAOLI

It will be noted in the record that five cases were consolidated for the purpose of trial (R. 120-121). See also opinion and decision of the court (R. 40).

It is desired to point out certain testimony with reference to the entry of M. P. Depaoli, who paid the full purchase price for his lands, the money being accepted by the Register and Receiver and deposited in the United States Treasury. After the commencement of these cases, the money paid by Mr. Depaoli was tendered back to him but he refused to accept the same and the money is still held by the United States.

The testimony of Mr. M. P. Depaoli concerning the payment of the purchase price in full appears in the record at pages 234 to 241 inclusive.

At page 238 of the Record, the following appears:

"Q. Have you made any payment to the Land Office at Carson City for this land under the entry that you made in 1925?

A. Yes, I did.

Q. To whom did you pay the money?

A. The United States Land Office, Carson City.

Q. Did you obtain a receipt for it?

A. Yes, sir.

Q. Up to the time until after this suit had been filed, did you receive any money that had ever been tendered back to you.

A. No.

Q. Did you recently, just a few days ago, or a few weeks ago, receive a letter tendering this money back to you?

A. Not the money I paid in 1925.

Q. I mean the full payment under your contract.

A. Yes.

Q. What did you do with the check that came?

A. Returned it to its original source."

* * * * *

At page 239 of the Record:

"Q. How much money did you pay into the Land Office under your contract of purchase, the final payment?

A. $5,116.62, something like that; I don't know."

It will also appear from the Record (pages 239-240)

that the United States held the money until April, 1939, after the filing of this suit and tendered back to Mr. Depaoli a government check for $5,116.62, which Mr. Depaoli promptly returned to the United States. In the foregoing respect, the case of Mr. Depaoli differs somewhat from the other four cases in that the plaintiff refused to accept the moneys tendered by the other settlers whose lands are involved in the suits in question on the grounds that the entries had been cancelled when the offer was made. The Government relies upon its cancellation and refuses to accept the balance of the purchase price.

CONCLUSION

In view of the fact that Congress, as well as the Department of the Interior, has recognized the equities of settlers and their continuous effort to perfect the titles to the lands involved in the suit in question, it is respectfully submitted that the entries should not be cancelled and the settlers ejected from the premises, thereby working a forfeiture of the moneys already paid by them as well as the moneys expended by them and their ancestors in the development of the lands from a raw state and in the construction of homes and other improvements.

Under the terms of the Act of June 7, 1924, it would seem that the interest of the United States can be protected by a suit to recover the balance of the moneys due but even that is unnecessary in that the appellees stand ready and willing at this time to pay the bal-

ance of the purchase price, notwithstanding they feel that the Secretary of the Interior has erred in refusing to recognize their equities resulting from the value of their improvements on the lands and has included the value of the improvements in the appraisal figures. It will be particularly noted in conclusion that the moneys already paid by the appellees far exceed the value placed upon similar lands by the United States in disposing of lands to settlers.

Dated: February 18, 1942.

Respectfully submitted,

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APPENDIX A

CHAPTER 25A.—*Lands Held Under Color of Title* (New)

1068. LANDS HELD IN ADVERSE POSSESSION; ISSUANCE OF PATENT; RESERVATION OF MINERALS; CONFLICTING CLAIMS. Whenever it shall be shown to the satisfaction of the Secretary of the Interior that a tract of public land, not exceeding one hundred and sixty acres, has been held in good faith and in peaceful, adverse, possession by a citizen of the United States, his ancestors or grantors, for more than twenty years under claim or color of title, and that valuable improvements have been placed on such land, or some part thereof has been reduced to cultivation, the Secretary may, in his discretion, upon the payment of not less than $1.25 per acre, cause a patent to issue for such land to any such citizen: Provided, That where the area so held is in excess of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres, may be patented hereunder: Provided further, That coal and all other minerals contained therein are hereby reserved to the United States; that said coal and other minerals shall be subject to sale or disposal by the United States under applicable leasing and mineral land laws, and permittees, lessees, or grantees of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining such deposits: And provided further, That no patent shall issue under the provisions of this chapter for any tract to which there is a conflicting claim adverse to that of the applicant,

unless and until such claim shall have been finally adjudicated in favor of such applicant. (Dec. 22, 1928, c. 47, p. 1, 45 Stat. 1069.)

1068a SAME; appraisal. Upon the filing of an application to purchase any lands subject to the operation of this chapter, together with the required proof, the Secretary of the Interior shall cause the lands described in said application to be appraised, said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement of the lands by the applicant or his predecessors in interest, and in such appraisal the Secretary shall consider and give full effect to the equities of any such applicant. (Dec. 22, 1928, c. 47, p. 2, 45 Stat. 1070.)

APPENDIX B

ACT OF JUNE 7, 1924

That the Secretary of the Interior is hereby authorized to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands in the Pyramid Lake Indian Reservation, in the State of Nevada, that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: Provided, that no more than six hundred and forty acres shall be sold to any one person or corporation: Provided further, That said sales shall be by private cash entry after it has been shown to the satisfaction of the Secretary of the Interior that the lands applied for have been settled upon, occupied, and improved as required by this Act, and in addition to such price per acre as may be fixed by the Secretary of the Interior all entrymen hereunder shall pay the same fees and commissions as provided by law where public lands are disposed of at $1.25 per acre. The proceeds of said sales shall be deposited in the Treasury of the United States and be subject to appropriations by Congress for the Piute Indians of the said Pyramid Lake Indian Reservation.

2. That the Secretary of the Interior is also authorized to have a survey and plat made of the town of Wadsworth, in said Pyramid Lake Indian Reservation, and thereafter sell the unpatented lands embraced in the said town as provided for by section 2384 of the Revised Statutes of the United States, and on com-

pliance with said statute the purchasers of the lots shall acquire title as provided for by the said statute: Provided, That any lands within the limits of said town used for Indian school purposes or for other public use for Indians shall be, and the same are hereby, reserved from said town site, and the Secretary of the Interior, upon payment to him of the sum of $100, is hereby authorized to convey by patent to the board of county commissioners of Washoe County, Nevada, or other proper school officials of the town of Wadsworth, Nevada, the lands now known as lots thirty-eight to forty-seven, inclusive, of block two in said town of Wadsworth, as surveyed in 1898 by T. K. Stewart: Provided further, That if there are any Indians residing in said town and in possession of and claiming any lots therein they shall have the same rights of purchase under the said statute as white citizens. The proceeds of the sale of lands in said town shall also be deposited in the Treasury of the United States and be used by the Secretary of the Interior for the Piute Indians of the Pyramid Lake Indian Reservation, and the proceeds derived from the sale of lands under section 1 of this Act are hereby made available for use by the Secretary of the Interior in making such surveys or resurveys within the said town site of Wadsworth as may be necessary to carry out the provisions of this Act.

3. That titles to lands in said Pyramid Lake Indian Reservation acquired by patents heretofore issued by the United States to any Railroad company, individual, or the State of Nevada, or by certification to the State of Nevada, are hereby confirmed.

4. All sales in accordance with section 1 of this Act

shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: Provided, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.